EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #1:13-cv-09244-
IN RE	:	RA-SDA
ACTOS ANTITRUST LITIGATION	:	
		New York, New York
	:	March 29, 2022
----------	:	TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE STEWART D. AARON,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For All Plaintiffs:
COHEN MILSTEIN SELLERS & TOLL PLLC
BY: AARON JOSEPH MARKS, ESQ.
88 Pine Street, #14
New York, New York 10005

For Takeda Defendants:
MORGAN LEWIS & BOCKIUS, LLP (PA)
BY: R. BRENDAN FEE, ESQ.
MELINA R. DIMATTIO, ESQ.
DANIEL P. HUYETT, ESQ.
1701 Market Street
Philadelphia, Pennsylvania 19103

Transcription Service:
Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

Proceedings conducted telephonically and recorded by electronic sound recording;
Transcript produced by transcription service

INDEX

E X A M I N A T I O N S

Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

HONORABLE STEWART D. AARON (THE COURT): This is Magistrate Judge Aaron. This is the matter In Re ACTOS Antitrust Litigation, Master File Number 13-cv-9244. This line is being recorded. I'd like to have the parties identify themselves, please, starting with counsel for the plaintiff.

MR. AARON J. MARKS: Good afternoon, your Honor. This is Aaron Marks on behalf of all plaintiffs.

MR. R. BRENDAN FEE: Good afternoon, your Honor. This is Brendan Fee from Morgan Lewis on behalf of the Takeda defendants. And along with me are my colleagues, Melina Dimattio and Patrick Huyett.

THE COURT: Good afternoon. I read the parties' submissions that were filed at ECF 359, 362 and 366. And it's the plaintiffs' letter motion. I'm happy to hear from the plaintiff about anything that they want to emphasize or say, I mean, keeping in mind that I've already read the thing and I may have a few questions along the way. And then, obviously, I'm happy to hear from the defendants next. So I'll turn the floor over to the plaintiffs' counsel first.

MR. MARKS: Thank you, your Honor. Again, this is Aaron Marks on behalf of all plaintiffs. As your Honor is aware from the papers, there are two issues before the Court, each involving email threads and earlier-in-time emails. And

an email thread is just a collection of emails that has been replied to or forwarded to one another. They're associated in email software, such as Outlook or Gmail, which your Honor may be familiar with. Earlier-in-time emails are any email in that thread collection except for the most recent email.

And the issue here is that defendants are proposing to produce virtually no earlier-in-time emails or metadata and not include any of those earlier-in-time emails on their privilege log. We think this severely prejudices plaintiffs, hampers our ability to prosecute the case and is barred by the federal rules, local rules and the Second Circuit's precedents.

Unless your Honor would prefer otherwise, I would just being with the privilege log and make a few points. First --

THE COURT: Well, sure. If you want to start with the privilege log, you can.

MR. MARKS: Certainly, your Honor. So we have three primary points just to emphasize on the privilege log. And the first something that we raised in the plaintiffs' briefs -- defendants didn't really respond to it in their papers -- but it's that this is a case where privilege is enormously important. The allegations at the heart of this case are that defendants filed

misrepresentations with the FDA about patents that they had rights to, which triggered regulatory and legal consequences, including litigations, and that that all delayed the entry of generic competition for their diabetes drug called ACTOS.

So defendants have understood from the beginning of this case that litigation, kind of legal facts and potentially privileged documents were going to be at the center of this. And they agreed to include on their document custodians a number of attorneys. And they agreed to that in the discussions over the scope of discovery. The Court also recognized that privilege would be at the heart of this case when it scheduled -- included on the case schedule two separate deadlines for privilege logs, as well as a deadline for defendants to elect their advice-of-counsel defense. There's a specific deadline when they're going to elect that defense or not; and if they do, there will be a privilege waiver associated with it. If defendants elect to a privilege, there will be an intense focus on their privilege log because in cases like this when a defendant waives privilege to rely on an advice-of-counsel defense, the parties often dispute what the appropriate scope of that waiver should be. And plaintiffs are going to have to scrutinize extremely closely every

entry on defendants' privilege log to understand whether they have appropriately asserted privilege or not.

So privilege is extremely important on this case, but the second point to underscore -- and I'll make it brief since your Honor has read the papers -- but defendants' proposal really makes it impossible to assess privilege for all of these earlier-in-time emails. To assess privilege under the federal rules and the local rules, Second Circuit precedents say you need to know who was involved in the communications. Defendants aren't going to share that for these earlier-in-time emails. You also need to know when were the communications sent and what generally were they about. Defendants aren't disclosing any of that for the earlier-in-time emails. This makes it impossible to assess whether a lawyer was even involved or whether there may have been a third party involved whose presence would break the privilege. And so we think that it just clearly violates the local rules, federal rules.

And that all is driven home in the *Bystolic* case, your Honor, which is the last point I would just touch on. Judge Liman just last year decided in *Bystolic* that -- he rejected the proposal defendants are making here. And *Bystolic* is another larger antitrust case, also involves a

pharmaceutical product, very similar to here. And what Judge Liman held is that each email in an email thread is a separate communication for which a privilege may or may not be applicable. Accordingly, each individual email must be logged in the thread separately because, otherwise, the Court would have no way to assess whether those earlier emails were actually privileged. This would result in what another case called stealth claims are privileged. And if your Honor saw the attachment to our reply brief filed as Exhibit C, that's an example that shows this isn't hypothetical that defendants would be asserting stealth claims of privilege. In their production there are email threads where the individuals on the topmost thread were not present at all on the earlier threads -- on the earlier emails, I should say. This would mean that if defendants were to withhold that thread, we would have no idea -- plaintiffs and the Court would have no idea that they had withheld earlier-in-time emails involving particular individuals.

Ultimately, just to conclude this point, this would take what is the defendants' burden to establish privilege and it would flip it to the plaintiffs first, who would have to challenge vast swaths of these earlier-in-time emails for which we would have no information

disclosed. And then that would ultimately come to the Court, which would have to review these documents *in camera*. But that's exactly what Rule 26 seeks to avoid. The advisory committee notes, Rule 26, says that the reason a party has to disclose this basic information is so that the Court can avoid having to review, you know, enormous tranches of documents *in camera*. And so we think the minimal burden of having to identify this basic information, such as sender, recipient, date will provide an enormous benefit to the parties and the Court as this case goes forward so that we can resolve privilege disputes between the parties without having to burden the Court.

Unless the Court has any questions on the privilege log, I would move to the production issue.

THE COURT: Yes, I do have questions. And what I'd like to do is hear from -- after I ask my questions, hear from the defendants on the privilege log point and then move to the second point and then hear from the defendants.

So here's my question: Judge Liman did not address the local civil rule, right, 26.2C and the accompanying committee note. And he doesn't get into the issue of, for lack of a better term, trying to reduce the burden on the party asserting the privilege. So, I mean,

the issue just from -- I mean, the opinion is very short, or the order is very short -- but you're not suggesting, are you, that the defendants are precluded from doing a document-by-document log of every single earlier-in-time email? I mean, aren't they allowed, for example, to take a categorical approach with respect to certain tranches?

MR. MARKS: Sure, your Honor, I'll take that in two parts. So, first on Judge Liman's opinion and Rule 26, I'm not sure if your Honor has it in front of you, but page three of that opinion as it's reproduced in Westlaw, or it's under the heading Four in the opinion, actually does quote Rule 26.2. It says, "Expressly, Local Civil Rule 26.2 requires that a party asserting privilege in response to a document request provide," and then it sets forth all of the specific information. So I do think Judge Liman had Rule 26.2 in mind when writing that opinion. And the ruling on email-by-email --

THE COURT: Right, but he did not -- he's relying on the earlier part of 26.2. I'm going to pull it up, but does he discuss 26.2-C? Am I misremembering?

MR. MARKS: You're not misremembering, your Honor; 26.2-C is not discussed in that opinion. But I think --

THE COURT: It's on the next page of the local civil rules. I'm not suggesting that my colleague, Judge

Liman, didn't turn the page; but on the edition that I was looking at of the local civil rules, it's certainly -- it's on the next page. And I don't think they're necessarily inconsistent. And although -- because 26.2, the earlier part of it, A and B, tracks the federal rule; but what the judges of this court who adopted the local civil rule had in mind, particularly given the types of litigation that we have in the Southern District of New York, ways to alleviate burdens and --

MR. MARKS: Absolutely, your Honor. And I think, just looking at the text of subsection C, which we think is important in this dispute and did bring up in our brief, so subsection C says a few things. First, it does allow categorical logging. That's not in dispute. But it also says that a party, quote, "may object if the substantive information provided by this rule has not been provided in a comprehensible form." So then the question is well, how do we reconcile those two things? What does it mean to provide the categorical log but also provide the, quote, "substantive information required by this rule." And I think the compromise that plaintiffs proposed to defendants here when we were discussing this at first exactly resolves this tension. So what plaintiffs said to defendants is if you have an email thread where all of the individuals on

the email thread are the same and they're discussing the same subject matter, then under this rule it seems proper to provide a single entry for that thread. Even though that is a grouping of -- could be 5, 10, 20 documents, 20 emails, it would make sense to group those because the basis of the privilege is the same. And that's what the rules says; it says that you can use a categorical approach, quote, "when asserting privilege on the same basis."

But because the heart of a privilege claim turns on who is involved in the communications, was it a third party, an attorney, somebody else, and also turns on what is the subject of the communication, is it actually a request for legal advice, then when those two things vary, the participants and the subject matter, then it's no longer appropriate to categorically log, and the substantive information required would no longer be provided.

And so, from plaintiffs' perspective, that's how these, you know, two kind of somewhat competing parts of subsection C can be resolved. And, again, plaintiffs are completely amenable to accepting single log entries for threads as long as the individuals on the thread and the subject matter are the same.

THE COURT: All right, why don't I hear from the defendants? And as the defendants speak, I'd like to hear their perspective on whether a metadata log could be provided. As I'm sure everyone's aware, through Outlook one can populate various fields, to, from, date, re. Oftentimes the re isn't illuminating, for lack of a better term, and may need to be supplemented; but it would be a tool that the plaintiffs could use to try to satisfy that part of Local Rule 26.2-C of providing substantive information in a comprehensible form. So when defense counsel talks, if they could talk to the practicality and the feasibility of a metadata log for privileged documents. I forget who's speaking on behalf of the defendants, but I'm happy to hear from you about the privilege log generally and about the feasibility of a metadata log, please.

MR. PATRICK HUYETT: Yes. Thank you, your Honor. This is Pat Huyett from Morgan Lewis on behalf of Takeda.

So the first thing I'll say is that creating a privilege log, especially in a complex case like this involving thousands of documents, is an incredibly burdensome and expensive exercise. And the local rules in this court, the federal rules, the case law, the Sedona Principles, they all recognize that, and they all encourage

measures to alleviate some of that burden and expense.

As your Honor noted, Local Civil Rule 26.2-C, it doesn't just allow for a categorical log; it encourages parties to create and provide a categorical log. And it even says that a categorical log is presumptively proper. And that's the path that Takeda is proposing to pursue here with its log. And so then the question becomes what is Takeda required to include in its categorical log. And we think that, you know, there are no rigid requirements on what Takeda has to include in its categorical log. As your Honor recognized the subsection A-2 of the local rules of 26.2 is separate from subsection C allowing for categorical logs. So a categorical log does not have to provide all of the information listed in subsection A-2-a as plaintiffs claim in their papers on this issue.

And so the proper approach, then, for a categorical log is it has to include enough information for the opposing parties to assess the claim of privilege. And that's the standard from the federal rules. And we think, you know, in the categorical log context, you know, a defining feature of categorical log is its flexibility, is its efficiency.

So here, what Takeda is proposing to do is to provide plaintiffs with enough information in a single log

entry to allow them to assess the claim of privilege, because that's what's required by the federal rule and that's what's required by subsection C here. Plaintiffs will also have additional information, such as the subject of the email, the date of the most recent-in-time email and the participants to that email. And that information is enough to allow the plaintiffs to assess the privilege claim.

And it's clear, if you look, actually, at the federal rule and the comments to that rule, that the types of information that plaintiffs claim that they need, they claim presents, you know -- that without this information, it's an impassable, you know, obstacle to assessing the claim of privilege, that's just not borne out in practice and by the rules. The comments the advisory committee notes to the 1993 amendment to Rule 26 of the federal rules says the following: "The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by

categories." So here, what this comment is saying is that this information that plaintiffs claim is absolutely necessary for them to assess the claim of privilege, that's nice-to-have information; it's not required information, it's not absolutely necessary for them to assess the claim of privilege. And so, in cases like this one, where the voluminous documents are claimed to be privileged or protected, Takeda can proceed under its proposal consistent with the federal rule and the local rule on categorical logging.

So, your Honor, I'll address the metadata question that you raised. And if I understand your question correctly, it's whether -- what are the practicalities of Takeda providing a pure metadata log for the lesser-included emails in the email threads. And the first thing I'll say --

THE COURT: For privilege I am -- I'm now focusing on the privilege issue, but yes, go ahead.

MR. HUYETT: Understood, your Honor. The first thing I'll say is I'll just reiterate that plaintiffs don't need that information to assess the claim of privilege. We will be providing them with the information necessary to assess the claim of privilege as we're required to do under the federal rules and under the local rules.

THE COURT: Yes, if I can just interrupt you there? Because I had experience with this in the *SM Kids* matter, which when we get to the next issue, you point out the protocol that was entered there. So what happened in *SM Kids* is there were some privilege -- the case eventually settled -- but there were privilege issues, and I had to review things *in camera;* and, as you note, the threading was used. So unbeknownst to the -- I'm trying to remember who was asserting privilege -- I guess unbeknownst to the plaintiff -- no, actually, I think it was the other way around. Plaintiff was asserting privilege, and unbeknownst to the defendant, in some earlier-in-time emails there were third parties that were in and out, for lack of a better term, so they weren't on the initial string, they were added, and then they were dropped. And I found with some of the intermediary emails that there was a waiver because there was a third party on them. So I ordered those -- redactions done, right, so that the -- I guess once the person came on, it was everything that came before because that person would have seen them, was not privileged while things that came after, after it was forwarded and the third party was dropped, I found that privilege stayed. So it would impose an awfully large burden if I were to permit the threading to be done -- and we're going to get to that

issue next -- for Takeda lawyers or paralegals, whoever are going to do it, to have to go through and keep an eye out, for lack of a better term, on who all of those intermediary recipients were; whereas, if a metadata log were created of all of the earlier-in-time privileged emails, you wouldn't have to go through the manual process and rely upon someone's eyes to be able to pick up the fact that an interloper, to just use that term, has come into the middle of an email chain and then drops out. So it would deal with that issue.

Sorry for interrupting you.

MR. HUYETT: Oh, no, no problem, your Honor.

We have discussed that with -- we have discussed that possibility of trying to create a metadata log or have created a metadata log of the nature that you describe. And our understanding is that it can be done, but it will still require some manual work, and it will not -- for lack of a better term, it won't be as accurate as one would like. So we have looked into that, and we --

THE COURT: I didn't understand the accuracy point. My understanding is the fields are just literally transferred, so whoever is listed in the To and the From and the CC and the BCC, it just populates. So I'm not sure of your point about accuracy. Obviously, somebody needs to

go through the subject line to make sure that there's no privileged information that's set forth in the subject line, which can happen, I suppose. But I didn't understand your accuracy point.

MR. HUYETT: Well, our understanding is that sometimes, you know, the automated process for that to the extent we can do it. Sometimes it can't always be relied upon to pick up everything is the accuracy point.

THE COURT: All right. I mean, look, it is what it is. I mean, I suppose Outlook isn't infallible, but on the other hand, there's not much to go wrong, it seems to me. But go ahead. I interrupted you.

MR. HUYETT: So I would propose or we would propose a more reasonable approach, which we have proposed. And that is where plaintiffs identify emails where they have a reasonable request or reasonable basis for seeking that additional information, we are more than happy to meet and confer with them and to work out a solution. We don't think that the burden that will be imposed from having to create some sort of log or to go through that process and any manual effort that's required there justifies, you know, the few instances where plaintiffs might seek this information.

And I'll also note that one other additional

compromise that we've offered to plaintiffs to assist them in their review of the log is something that's not required by the rules at all, but in our experience, plaintiffs often ask for it, and it is something that can help them to assess a claim of privilege on the log. And that is for each entry on the log where we're logging an email thread, we will also provide the number of emails in the thread and the number of pages that the thread consists of. And what that does -- and I'm speaking from experience because I've gone through privilege logs for this purpose before -- is that where plaintiffs come across entries that they are particularly interested in, you know, as they're triaging their privilege log review, as they say, and they come across an entry that is a thread that is entirely withheld and they see, for example -- and I actually think to use one of their exhibits to their reply is helpful. So Exhibit C, for example, contains eight emails in the thread, and it spans 22 pages. If they come across a thread like that that is entirely withheld and consists of eight emails and 22 pages across the thread, then that gives them more information about how many -- you know, about sort of the extent of the information that's included in the document, and that gives them a reasonable basis to meet and confer with us and seek the additional information

in the lesser-included emails.

THE COURT: So let me ask you, I saw a reference in the submissions to a privilege log protocol. Where does that stand?

MR. HUYETT: The privilege log protocol is fully negotiated. And if I'm remembering correctly, I believe this is the only outstanding issue on that protocol. And we actually attached that protocol with a red line to the competing proposals as an exhibit to our opposition.

THE COURT: Okay, so sorry I missed that. Let me pull it up.

Okay, so the red line shows Takeda's markup?

MR. HUYETT: Yes, your Honor.

THE COURT: Okay. Do plaintiffs -- sorry, were you finished on the privilege log issue?

MR. HUYETT: Yes, your Honor.

THE COURT: All right, do plaintiffs wish to make any other remarks about that?

MR. MARKS: Yes, your Honor, with the Court's indulgence, just a few brief points in rebuttal.

THE COURT: Okay.

MR. MARKS: First, I think with the *SM Kids* case your Honor hit the nail on the head. That's perfectly illustrative of the concerns the plaintiffs have here with

defendants' proposal. The emails that we attached as exhibits to the reply brief show that in defendants' usual course of business different people come on and off email threads, and this could include third-party interlopers, as your Honor said. There would be absolutely no way to know whether that was going on under defendants' proposal. It would inevitably lead to *in camera* review and needless burden on the Court, which we can avoid here.

Second, on defendants' burden argument, I understood Mr. Huyett to say that the kind of log that your Honor is proposing, a metadata log populated by Outlook, to use his words, "can be done." It would require, quote, "some work" manually. But, you know, I think at the end of the day this is a situation where an ounce of prevention is, you know, a pound of cure. If defendants can put in, you know, whatever minimal effort it takes to generate that kind of metadata log that gives plaintiffs the information about who sent and received the emails, when they were sent, that kind of thing, that will help avoid substantial burden down the line.

Just on that information itself, you know, Mr. Huyett said that it's nice to have, to know who sent and received emails. I think that, you know, relying on a committee note to the rule which talks about what may be

burdensome in some situations, it can't override what the Second Circuit has said should be included in a privilege log. And we cited the *Construction Products* case to your Honor -- you saw that in the briefs. Defendants didn't have a response to it. The Second Circuit's clear on what should be included in a privilege log and what's needed to assess the claims of privilege, and I think that, you know, your Honor's experience with the *SM Kids* case shows just why that information is required.

And, lastly, I would just say that defendants proposal that plaintiffs should, you know, ask for additional information on a case-by-case basis just is not practicable. There was a suggestion that plaintiffs could somehow triage the entries based on the information included in defendants' log. That's just not true. All the defendants would be doing is to say this thread has five emails in it, this has ten. That's nothing more than telling plaintiffs there is an email that exists which has been withheld. That tells us nothing about what its subject matter was, who was participating in it, when it was sent. And that's crucial information. These threads can involve all sorts of different people coming on and off. They can span months and months and months. And so to only log information about the most recent email is

plainly deficient under all of the authorities; and so we would request the Court require defendants to produce this information in their privilege log.

THE COURT: Okay. So let's turn to the threading issue, please. And I'll hear from plaintiffs' counsel first.

MR. MARKS: Thank you, your Honor. On the threading production issue, what we understand defendants to be doing here is withholding virtually all of the earlier-in-time emails. They don't seem to dispute that they're responsive to the negotiated scope of discovery, they don't dispute that they're relevant. They're simply withholding them. This has massive consequences for plaintiffs' ability to litigate this case.

First and most prominently, it makes searching their documents almost impossible. And this is in clear contravention of Federal Rule of Civil Procedure 34, which requires that documents be produced as they're maintained in the course of business. And, again, the advisory committee note there says that if emails are kept in a searchable form, they shouldn't be produced in a way that degrades or eliminates that searchability.

Here, defendants' proposal would do just that. And just to take an example, if defendants produced an

email thread that had five emails on it; and say the first and second email were from the CEO of the company, but the CEO gets dropped from the thread, plaintiffs would have absolutely no way to locate those earlier emails from the CEO of the company even though they could be crucially important to the case. So running a search for all emails from the CEO would not turn up those earlier emails. And the same goes on the To side. It comes impossible to actually search for emails in this case, which is a hugely important task as we proceed through discovery. For example, your Honor may be familiar with, you know, a routine task ahead of depositions is just to pull all of the witness's emails and read through those. And, you know, it's something that's crucially important to do to understand what happened in the case, who was discussing what with whom and when. Defendants' proposal would just make that impossible. And given that plaintiffs are the ones with the burden to prove the elements of this case, I think this severely prejudices us as we move forward through discovery and eventually to trial.

Now, defendants' only real argument for not producing this information is that they say it's redundant. They say that, you know, they're not, quote, "withholding any unique content." We think that's just plainly not true

based on the face of the documents. We attached exhibits to each of our reply briefs, and if your Honor looks at the first email that was sent in that thread, which this is a thread defendants produced, the first email identifies a sender but does not show who actually received the email. And this is information which we need to understand what happened in this case. It's information that would be visible if defendants produced these emails as they're stored in the ordinary course of business, along with the metadata. But we simply don't have that information. We're also never going to know who was bcc'd or blind carbon copied on emails because that information also is never visible in the way defendants intend to produce these email threads.

We think that these email threads just are not actually redundant of what defendants are withholding, and there's crucial information that we're missing, even beyond the searchability problem, which itself is a huge issue. So plaintiffs' position is, you know, these are not redundant. It's visible from the face of the documents. But even if they are redundant, if defendants are right, well, that's barred by the ESI order in this case. Plaintiffs and defendants negotiated a stipulated order governing ESI in this case back in 2015, and defendants

never raised email threading back then, and it took plaintiffs frankly completely by surprise when defendants told us they were doing this. And that's because the ESI order says that all responsive ESI is going to be produced along with all metadata. It also says that there's one way that a party can deduplicate documents if they're exact duplicates using something called a hash function, and which does not apply here. So, you know, we think these are not redundant documents. We think that there's unique information we're missing. And even if defendants are right, this is barred by the ESI order.

I would just conclude by saying that the earlier-in-time emails are documents defendants already have. We're not asking them to create something new to produce here. And their position is that they've already reviewed these. They say, "We've already taken a look at these, and we understand that the body text of these emails is included in the threads we're going to produce." And so if they've already reviewed them, they should know which ones are privileged, which ones are not, and they should be able to simply produce them. It should be a push of a button. So we think the burden is really incredibly low here, given that defendants have these and have reviewed them. And, you know, for those reasons, we would ask your Honor to

require that defendants produce those responsive and relevant ESI that they maintain they're going to withhold.

THE COURT: All right. Let me hear from defense counsel. And one of the things I would like to hear about or have you respond to is the precedent, for lack of a better term, that's been provided to me has been in the form of protocols. And it certainly is the case that there are protocols out there, including *SM Kids* and others, where parties have agreed to so-called email threading; and under Rule 29, as we know, parties can stipulate to discovery methods and that kind of thing. But I haven't seen anything where a Court has imposed it in circumstances where, you know, my review of the protocol that was entered back in March of 2015 certainly is silent about threading. But I think that threading is inconsistent with the spirit of it. But why don't you comment on that as you make your argument, please?

MR. HUYETT: Sure, your Honor. Pat Huyett again.

So email threading, it's common and well accepted. It's usually not controversial. As you mentioned, you often see parties agree to it in the stipulated ESI protocols. But we couldn't find any cases where this issue was actually litigated, and plaintiffs didn't cite any. So that's likely because email threading benefits both

parties; it benefits plaintiffs and it benefits defendants. It does so mainly by reducing the document volume, we have found, by about 25%. And so that helps both sides because it means fewer documents to store, fewer documents to review, and for defendants fewer documents to produce. And in our experience plaintiffs don't usually seek to compel document dumps of additional information that they already have.

We agree that the ESI protocol is silent on email threading. So in that case, the federal rules govern whether email threading is proper. And the federal rules allow for email threading. And our position is you start at Rule 1, which says that the rule should be construed to secure the just, speedy and inexpensive determination of every action and proceeding --

THE COURT: I have to admit, counsel, when you start with Rule 1 -- but go ahead. That's -- in baby judge school we were told, "Always refer to Rule 1 if you've got nothing else." But why don't you go onto your next rule?

MR. HUYETT: Okay, well, maybe my next rule will be more compelling, your Honor. So Rule 34(b)(2)(E) says -- and plaintiffs cite this rule -- it says, "A party must produce ESI in a form in which it is ordinarily maintained or in a reasonably usable form or forms." And

the key is the latter part of that statement, "in a reasonably usable form." I heard Mr. Marks say multiple times that by using email threading we have made it almost impossible for plaintiffs to search the documents. And that's just not true. All of the emails that we have produced and will produce are fully text searchable, meaning plaintiffs can go into their database, they can take a particular witness's name, they can punch that witness's name into the database and pull up all of the emails that hit on that witness's name. So to be sure, they will not have the full search capabilities that they want and seem to think they're entitled to, but the rules don't require Takeda to provide or produce the documents to plaintiff in a manner, you know, that allows them to search as they would like to. We've provided them in a fully searchable format.

And, also, the information that they claim to be precluded from viewing, the metadata, most of that information is in the email thread itself. So they can pull up an email thread and they can look and they can see the date the email was sent, the sender, the recipients, and other information like that.

So our position is that it is reasonable and proportionate to plaintiffs' needs here for us to proceed

with email threading. And in instances where plaintiffs feel that they need information that they're missing, we are happy to meet and confer with them and consider any reasonable requests for that information. And we actually think that the exhibits that they've attached to their reply highlight the reasonableness of our position. So plaintiffs have attached several exhibits they claim show their missing critical information. But in the vast majority of the emails produced they will have all of the information they're looking for in the email thread itself. And in those select instances in which some of that information is missing and plaintiffs feel it's important to their case to have, Takeda is happy to consider reasonable requests for that information. And we think that's the reasonable and proportionate solution, not the wholesale production of the tens of thousands of earlier-in-time emails.

THE COURT: So the burden on Takeda of producing these emails in native format, all of the emails that are responsive, not just the threaded ones, isn't significant on the front end, for lack of a better term. In other words, I mean, obviously, it will take time for it to run, but the emails will be deduped and downloaded to presumably a pst database and then sent out for production. It's

essentially a, for lack of a better term, a ministerial process, right? Because in order to create the threaded version, you had to have a population of emails that you were using to conduct the threading, am I right about that?

MR. HUYETT: Yes, that's correct, your Honor.

THE COURT: So the efficiencies come in, for lack of a better term, on the back end when you're dealing with the documents?

MR. HUYETT: Yeah, I think so. But I would also add that so on the front end but before producing those documents, there would be a fair amount of manual review that would have to go into the documents to ensure, you know, for example, consistency in privilege redactions across threads. You know, that's one of the benefits of email threading is that it allows for that type of consistency rather than, you know, potentially having situations where some information is redacted in one instance but not redacted in another. I know that that's a situation I've encountered quite frequently. And it creates a tremendous burden and cost on defendants in the form of the manual review and checks that have to go into that.

THE COURT: And looking at 34(b)(2)(E)(ii), which is what you focused on, it says, "Unless otherwise

stipulated or ordered by the Court, these procedures apply to producing documents or electronically stored information." And you read from (ii) which says, "If a request does not specify a form for producing electronically stored information, the party must produce it in the form or forms in which it ordinarily is maintained or a reasonably usable form or forms." But the ESI protocol from back in March of 2015, ECF 193, talks about production of ESI. And I think your adversary's position is that it doesn't say you get to only produce some of it. The thread is -- so they would argue that it's otherwise stipulated -- and I suppose this was so ordered by Judge Abrams -- so not only is it stipulated, it's also ordered by Judge Abrams. How do you respond to that?

MR. HUYETT: Well, your Honor, I believe that plaintiffs and Takeda are in agreement on the applicability of the Rule 34 provision that you cited. If I'm remembering correctly, the plaintiffs actually cite that provision in their letter motion. They say, "The federal rules require that ESI be produced in the form in which it is ordinarily maintained or in reasonably usable form." So I'm not -- I don't have the ESI protocol directly in front of me right now, but it seems that plaintiffs and Takeda are in agreement on the applicability of that rule.

THE COURT: Yes, but the plaintiffs like what's in the ESI protocol. And they're arguing that what you're arguing for is inconsistent with it.

MR. HUYETT: We don't think that what we're doing is inconsistent with the ESI protocol. The ESI protocol is silent on the question of email threading. So, in that case, what we did was we followed the federal and the local rules, and Rule 34 permits Takeda to produce the documents to plaintiffs in a reasonably usable form. So we took the efficient proportionate approach that's fully consistent with the rules.

THE COURT: All right. Sorry, did you have other points you wanted to make?

MR. HUYETT: No, that's it, your Honor. Thank you.

THE COURT: Okay. Any additional comment from plaintiffs?

MR. MARKS: Very quickly, your Honor. On the ESI protocol, just to make sure plaintiffs' position is understood, we do think the ESI protocol addresses this. We do like it, as your Honor said. I have a copy in front of me, and it says in Section F-3-a, which I believe we cited in our opening brief, quote, "All responsive ESI except that which is produced in native format should be

produced in black and white," and then it goes on to specify exactly how. But all responsive ESI should be produced. It also says, quote, "Each of the metadata and coding fields set forth in Exhibit 1 which can be extracted from a document shall be produced for that document." So we think the ESI protocol does set forth what's required here. It requires the production of all responsive ESI and metadata, including those earlier-in-time emails. And it would be perfectly acceptable to plaintiffs to read Rule 34 that say and saying it's been resolved by court order. The reason that we referred to the rest of the rule in our letter was in case your Honor didn't think the ESI protocol had resolved it. We think just under the rule, as well, this information has to be produced.

I did not hear any response to the advisory committee note which says, quote, "If the responding party ordinarily maintains the information in a way that makes it searchable by electronic means, it should not be produced in a form that removes or significantly degrades this feature." And, you know, although counsel has said that it's, quote, "common and well accepted" to do what they're doing here, the only thing they've ever cited for that is their own representation in an email. They haven't cited any cases or authorities saying that this is common or well

accepted. We don't think it is, and certainly plaintiffs don't accept it here.

Lastly, just on the compromise or half-measures that I would say defendants have proposed, first on can we search the current emails they've produced, while we can search for the topmost email on the thread, that doesn't allow us to search the vast majority of emails in the thread. So to search -- you know, if I -- just to use the earlier example -- would like to search for emails from the CEO, I am not going to be able to do that for any emails that are not the most recent in the thread because defendants are withholding those for themselves.

THE COURT: I think what he's saying is you could search for the person's name.

MR. MARKS: So a --

THE COURT: The way that you want to do it is to search for the -- run a search through the fields of sender/recipient. What he's saying is the person's name will be in there because it will be in the middle of the chain. And then, yet, you're going to have to go and hunt down. It's certainly not going to be as easy for you to create -- I remember in the old days when I practiced, I'd want to get from the paralegal through the relativity database the To, the From and the cc and bcc, and then the

separate thing was the dimensions. This would be -- somebody would have to go through every time the name is mentioned and see in the body of a lesser-included email whether the person was a sender or recipient. So it adds a layer of work for you.

MR. MARKS: Exactly, your Honor. It adds a layer of work which the federal rules say should not be added. But also, more importantly, I think it's just not possible, despite what defendants have said. We attached Exhibit C to our reply brief, which shows an email which doesn't actually display the recipients in the way defendants have produced it. And, in candor, your Honor, having helped prepare our briefing, I can say, you know, I think we had about two or three days, including the weekend, to do that; and we very easily were able to find those kinds of problems in defendants' production. They're likely pervasive. And so we think that, you know, to search for somebody's email address or their name, which it could be either -- we don't know exactly how it would be presented in the document. There will be many, many instances where the recipient is actually not included in the text of what defendants have produced. And so we do need that metadata and earlier email to be able to search it at all. We'll also never have bcc's. They're never visible in what

defendants have produced. But that information can be crucially important to find out who was involved in, you know, the communications in this case.

And so I think your Honor had it exactly right when you said it's essentially a ministerial process to take these emails that defendants claim to have already reviewed in order to verify that they're included in the latest threads that they've produced and to just simply produce them. We think that the burden here is very low. And without having the ability to effectively search through emails, plaintiffs will be severely prejudiced in our ability to prosecute this case as we go forward. So we would request that the Court require defendants to produce the earlier-in-time emails and metadata.

THE COURT: All right, well, I'm going to noodle this a bit, and I'll issue a written order -- keeping track of what days -- tomorrow.

Anything else the parties would like to raise?

MR. HUYETT: Just one last thing, your Honor, if you don't mind?

THE COURT: And who's this speaking? Sorry.

MR. HUYETT: This is Pat Huyett from Morgan Lewis on behalf of the Takeda --

THE COURT: Yes. Go ahead.

MR. HUYETT: Yes, your Honor, just one last thing. Going back to the privilege log issue, the plaintiffs have repeatedly referred to the Second Circuit law that they claim requires this information to be included in the privilege log. And I just wanted to address that case briefly. So that case, which is from 1996, does not address the issue here at all. The Court there articulated what should be included in the traditional document-by-document privilege log that was at issue in that case. Here the issue is what Takeda must provide in its categorical privilege log, which is an issue not at all addressed in this case. And it's addressed by the Local Rule 26.2-C, which we discussed earlier. And so I just wanted to address that case briefly, your Honor.

THE COURT: Okay. Thank you.

So I thank counsel for their excellent argument. And, as I said, I'll issue an order tomorrow morning.

MR. MARKS: Thank you, your Honor.

MR. HUYETT: Thank you, your Honor.

THE COURT: This matter is adjourned. Thank you.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of In re ACTOS Antitrust Litigation, Docket #13-cv-09244-RA-SDA, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: April 14, 2022